



No. 83-1060

In The
Supreme Court of the United States
OCTOBER TERM, 1983

LYNN LAWTHOR, JR.,

Petitioner,

v.

JACOBS MANUFACTURING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1

WHETHER A DISTRICT COURT'S CONSIDERATION AND DENIAL OF AN UNTIMELY POST TRIAL MOTION CONSTITUTES "UNIQUE CIRCUMSTANCES" JUSTIFYING AN EXTENSION OF THE TIME FOR FILING A NOTICE OF APPEAL UNDER FED. R. APP. P. 4(a) WHERE THE DISTRICT COURT DOES NOTHING DURING THE PERIOD FOR FILING A TIMELY NOTICE OF APPEAL INDICATING THAT THE UNTIMELY POST TRIAL MOTION IS BEING CONSIDERED OR THAT THE PERIOD FOR FILING A NOTICE OF APPEAL HAS BEEN EFFECTIVELY TOLLED BY THE FILING OF THE UNTIMELY POST TRIAL MOTION?

2

WHETHER THE FILING OF AN UNTIMELY MOTION FOR REHEARING IN THE COURT OF APPEALS TOLLS THE TIME FOR PETITIONING FOR A WRIT OF CERTIORARI UNDER 28 U.S.C. § 2101(c)?

PARTIES

Lynn Lawther, Jr.

Jacobs Manufacturing Company

Chicago Pneumatic Tool Company (parent company)

Consolidated Pneumatic Tool, Ltd. (India) (subsidiary)

Toku Hambai, K.K. (Japan) (subsidiary)

**Chicago Pneumatic LatinoAmericana, S.A. (Mexico)
(subsidiary)**

Revathi-CP Equipment, Ltd. (India) (subsidiary)

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BRIEF FOR THE RESPONDENT IN OPPOSITION

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit granting Respondent's Motion to Dismiss Petitioner's untimely appeal from the judgment of the district court was entered on August 18, 1983. On September 6, 1983, nineteen (19) days later, Petitioner filed a Motion to Vacate Order Dismissing Appeal, Motion to Reinstate Appeal and Motion for Rehearing which was denied by the same court on September 23, 1983. A petition for writ of certiorari was filed by Petitioner in this Court on December 20, 1983.

**APPLICABLE STATUTORY PROVISIONS,
SUPREME COURT RULES,
FEDERAL RULES OF CIVIL PROCEDURE
AND FEDERAL RULES OF APPELLATE PROCEDURE**

Statutory Provisions

28 U.S.C. § 2101(c) — Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Supreme Court Rules

Rule 20(4) — The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

Federal Rules of Civil Procedure

Rule 59(e) — **Motion to Alter or Amend a Judgment.**
A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Federal Rules of Appellate Procedure

Rule 4(a)(1) — In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be

filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

Rule 4(a) (4) — If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

RULE 40(a) — Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

STATEMENT

Respondent agrees generally with Petitioner's recitation of the procedural background of this case; however, Petitioner's description of the events surrounding the district court's ruling on the Motion for Summary Judgment and the Motion to Urge Reconsideration of Granting of Defendant's Motion for Summary Judgment ("Motion for Reconsideration") is somewhat misleading. *See generally* Order Denying Motion for Reconsideration (Appendix D to Petition for Writ of Certiorari).

In particular, Petitioner omits any reference to Judge Hill's April 8, 1983 order directing him to file a supplementary response to Respondent's Motion for Summary Judgment, since his previous response had not addressed the merits of the Motion. (Appendix A). After first indicating to the court that a response would be a "waste of paper", Petitioner submitted a lengthy response detailing the deposition testimony of Petitioner and of R. C. Hedrick, an employee of Respondent, upon which Petitioner relied to create an issue of fact. *See* Order Denying Motion for Reconsideration (Appendix D to Petition for Writ of Certiorari). As a result of this, the trial court delayed ruling upon the Motion for Summary Judgment until it had received and reviewed the full transcript of Mr. Hedrick's recently completed deposition. Thus, at the time the trial court granted Respondent's Motion for Summary Judgment it was in possession of all the material which Petitioner relied upon to create an issue of fact.

After the district court entered summary judgment in favor of Respondent, Petitioner filed a Motion for Reconsideration on May 17, 1983, only four days before his time for filing a notice of appeal expired pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure. It is undisputed that prior to the time Petitioner's time for appeal expired,

the trial court took no action with respect to the Motion for Reconsideration, and gave no indication to the Petitioner that his time for appeal was extended. Thus, at the time Petitioner's time for appeal expired he had absolutely no reason to believe his time for appeal had been extended — the only thing which had occurred was the *untimely* filing of a post trial motion under Rule 59 of the Federal Rules of Civil Procedure.

Petitioner also fails to disclose that his Motion to Vacate the Order Dismissing the Appeal, Motion to Reinstate Appeal and Motion for Rehearing was not filed with the Fifth Circuit Court of Appeals until September 6, 1983, nineteen (19) days after the entry of the order dismissing his appeal.

REASONS FOR DENYING THE WRIT

There were no "unique circumstances" in this case which relieved Petitioner from his obligation to timely file a notice of appeal and thus the cases relied on by Petitioner are inapplicable to the case at bar.

Petitioner contends that a writ of certiorari is warranted in this case because of the purported improper refusal of the Fifth Circuit Court of Appeals to apply the doctrine of "unique circumstances" to salvage his untimely appeal from the judgment entered by the district court in favor of Respondent. In support of his position, Petitioner relies exclusively on this Court's holdings in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) ("*Harris*") and *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964) ("*Thompson*"), as well as the Ninth Circuit Court of Appeals' decision in *Pierre v. Jordan*, 333 F.2d 951 (9th Cir. 1964), *cert. denied*, 379 U.S. 974 (1965) ("*Pierre*"). All three of these cases involved easily

distinguishable factual settings and are thus clearly inapplicable to the case at bar.

Respondent agrees with Petitioner that the cases cited above establish a very limited doctrine which has been selectively invoked in appropriate circumstances to relieve a prospective appellant of the consequences of filing an untimely notice of appeal. Petitioner, however, ignores the fact that this doctrine was considered and rejected by the Court of Appeals because the vital prerequisite for reliance on the "unique circumstances" doctrine — conduct by the trial court within the prescribed period for filing a notice of appeal which reasonably led the appellant to believe that the action taken by the trial court effectively tolled the time limitations for appeal — is not present in this case.

In *Harris, supra*, the Seventh Circuit Court of Appeals had dismissed an appeal because it found that the trial court's grant of a motion for extension of time to appeal based on "excusable neglect" was unwarranted and thus even though timely filed, the motion for extension of time did not toll the time for filing a notice of appeal. This Court found "unique circumstances" present since the appellant, in delaying his appeal, had relied on the trial court's order extending the time for appeal. Accordingly, this Court vacated the Circuit Court's dismissal because of the "obvious great hardship to a party who relies on the trial judge's finding of 'excusable neglect'...and then suffers a reversal of that finding..." *Id.* at 371 U.S. 217.

The "unique circumstances" doctrine was again applied in *Thompson, supra*, where this Court, in a divided opinion, held that a trial court's explicit assurance to the petitioner within the time for filing a notice of appeal that his post trial motion was timely constituted "unique circumstances"

effectively extending the running of the time for appeal. Thus, in both *Harris* and *Thompson* — the only cases from this Court upon which Petitioner relies — the prospective appellant was lulled into the false sense of security that he could delay filing his notice of appeal because of the extension of time explicitly granted by the district court. This crucial element is notably absent in the case at bar.

The only other case relied upon by Petitioner is *Pierre v. Jordan*, *supra*, where the Ninth Circuit Court of Appeals, in a questionable extension of the "unique circumstances" doctrine, held that the trial court's denial of an untimely post trial motion on the merits two days *before* the time for filing a notice of appeal expired justified the *pro se* party's belief that the post trial motion effectively tolled the appellate time limitations and thus refused to dismiss the appeal. The *Pierre* court recognized that had Mrs. Pierre, a layman, been informed that her post trial motion was untimely at the time the motion was denied on the merits, she still would have had two days to file her notice of appeal. In contrast, the facts of this case show that nothing done by the trial court during the thirty day period in which Petitioner was required to file his notice of appeal could have misled Petitioner.

Petitioner admits that the trial court took no action within the time for filing a notice of appeal which led him to believe that his post trial motion, filed nearly three weeks late,¹ was being considered or had any effect on the time

¹ The District Court's order granting summary judgment in favor of Respondent was entered on April 21, 1983. Under Rule 59 of the Federal Rules of Civil Procedure Petitioner had ten (10) days to serve his post trial motions. Petitioner, however, took no further action until twenty-six (26) days later when, on May 17, 1983, he filed his Motion to Urge Reconsideration of Granting of Defendant's Motion for Summary Judgment.

requirements for appeal. Thus, Petitioner's argument can only be construed to mean that the fact a court subsequently enters an order demonstrating actual consideration of an untimely post trial motion justifies the assumption on the part of the party filing such motion that the motion effectively tolled the time for filing a notice of appeal. Such a boot-strapping proposition is, at best, incredible. Under Petitioner's theory, any time a post trial motion is filed the district court should immediately determine whether the motion is timely, look to see when the time expires for appealing the judgment and insure that the moving party is informed of the untimeliness of his motion before the expiration of the time for filing a notice of appeal. It is difficult to conceive the magnitude of the burden such a procedure would place on the federal district courts.

In the absence of any misleading conduct by the trial court, Petitioner's reliance on *Harris, Thompson* and *Pierre* is misplaced and there is thus no basis for invoking the "unique circumstances" doctrine. Extension of the "unique circumstances" doctrine to the case at bar would not only emasculate the rules prescribing time limitations for post trial motions and appeals, but would also undermine their certainty and cause untold confusion among the lower courts and bar. *Thompson, supra*, 375 U.S. at 389-90, (Clark, J., dissenting).

There is no conflict between the Fifth Circuit Court of Appeals' position and the Ninth Circuit Court of Appeals' decision in *Pierre v. Jordan*, 331 F.2d 951 (9th Cir. 1964), cert. denied, 379 U.S. 974 (1965).

Petitioner attempts to create a conflict where none exists. The distinction between the Fifth Circuit Court of Appeals' reliance in this case on *Alvestad v. Monsanto Co.*, 671 F.2d

908 (5th Cir. 1982) ("*Alvestad*") and the Ninth Circuit Court of Appeals' decision in *Pierre*, *supra*, does not lie in any differing interpretations of law but rather on facts giving rise to or negating the existence of "unique circumstances."

The Fifth Circuit's position in *Alvestad* that a "district court's mere willingness to entertain a tardy motion for a new trial does not relieve a prospective appellant from responsibility for filing a timely notice [of appeal]," *Id.* at 911 n.1, is no more than proper recognition of the principle that the jurisdictional time limits set forth in FED. R. APP. 4(a) (1) cannot be directly or indirectly extended *in the absence of* "unique circumstances." See *Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257 (1978). In *Alvestad*, the court simply found that there were no "words or actions [by] the district court [which] clearly [misled] the aggrieved party into believing that the filing of an appeal within the thirty-day deadline was unnecessary." *Alvestad*, *supra*, 671 F.2d at 911. This holding is entirely consistent with *Pierre*. Moreover, the *Alvestad* decision correctly confines the "unique circumstances" doctrine to the carefully prescribed boundaries outlined by this Court in *Harris* and *Thompson*, *supra*.

Petitioner has failed to show that this case merits discretionary review by this Court.

The sole ground relied on by Petitioner to justify discretionary review by this Court is the purported conflict between the Fifth and Ninth Circuit Court of Appeals in applying the "unique circumstances" doctrine. As noted above, however, the alleged conflict is easily explainable by the facts presented to the respective courts for review.

Even if a strained reading of *Pierre* leads one to conclude that a conflict between the circuits might exist, the conflict

is neither so apparent nor of such a magnitude that review by this Court is warranted. Review by certiorari should only be granted

“in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a *real and embarrassing* conflict of opinion and authority between the Circuit Courts of Appeal.”

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923) (emphasis added); *see also Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1950).

The transparent conflict set forth by Petitioner is nothing more than a thinly veiled plea that this Court sanction his attempts to ignore the jurisdictional mandates of the Federal Rules of Civil and Appellate Procedure. The type of *ad hoc* relief requested by Petitioner does not justify taxing the time and resources of this already burdened Court.

The Petition for Writ of Certiorari was not timely filed and must, therefore, be dismissed for lack of jurisdiction.

Petitioner's disregard of the time requirements for appropriate actions by a disappointed litigant did not end with his untimely post judgment motion in the district court and tardy notice of appeal filed in the court below — it has continued up the appellate ladder to this Court.

On August 18, 1983, the Fifth Circuit Court of Appeals entered its judgment granting Respondent's Motion to Dismiss Petitioner's untimely appeal from the district court's judgment in favor of Respondent. Petitioner took no further action until nineteen (19) days later when, on September 6,

1983, he filed his Motion to Vacate Order Dismissing Appeal, Motion to Reinstate Appeal and Motion for Rehearing ("Motion for Rehearing") in the court below. When Petitioner's Motion for Rehearing was denied on September 23, 1983, he delayed filing his Petition for Writ of Certiorari until December 20, 1983, over four (4) months after the entry of the initial judgment dismissing his appeal.

Pursuant to 28 U.S.C. § 2101(c), "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be . . . applied for within ninety days after the entry of such judgment or decree." When the time for seeking relief in this Court is fixed by statute, compliance with the statute is a jurisdictional prerequisite for review by this Court. See *Matton Steamboat Co., Inc. v. Murphy*, 319 U.S. 412 (1943); *Department of Banking v. Pink*, 317 U.S. 264 (1942). Under the rules prescribed by this Court, however, the time period set forth by 28 U.S.C. § 2101(c) may be extended by the filing of a *timely* Motion for Rehearing. S. Ct. R. 20(4). Whether this Court may properly exercise jurisdiction in the case at bar thus depends on the timeliness of Petitioner's Motion for Rehearing in the court below, for if that motion was untimely it had no effect on the ninety day period set forth in 28 U.S.C. § 2101(c).

Rule 40(a) of the Federal Rules of Appellate Procedure provides that "a petition for rehearing must be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or local rule." In the case now before this Court, Petitioner's Motion for Rehearing was not filed until nineteen (19) days after the Court of Appeals entered its judgment dismissing his appeal and there is no indication that the time for filing a Motion for Rehearing was in any

way extended by the court below.² Thus, there was no tolling of the statutory ninety day period commencing August 18, 1983. Since the petition for certiorari in this case was not filed until one hundred and twenty-four (124) days after the dismissal of Petitioner's appeal, his petition is untimely and must, therefore, be dismissed for lack of jurisdiction.

Petitioner's discussion of the impropriety of the summary judgment entered by the district court is inappropriate — the only issue presented by Petitioner for review by this Court is the alleged error by the Fifth Circuit Court of Appeals in dismissing his appeal.

The sole question presented by Petitioner for review by this Court is whether the Fifth Circuit Court of Appeals erred in dismissing his untimely appeal from the district court's summary judgment in favor of Respondent. The merits of Petitioner's appeal from the district court's summary judgment are not in issue at this time. Petitioner, however, ignores this fact and improperly engages in a lengthy discourse of alleged error in the summary judgment entered by the district court in this case. Respondent refuses to participate in Petitioner's blatant misuse of the appellate process by responding to the arguments raised by Petitioner

² The fact that the Court of Appeals entertained the Motion for Rehearing is irrelevant. Prior to the revisions of the Supreme Court's rules in 1980, which were silent on the question of the effect of petitions for rehearing, there was limited authority that an untimely petition for rehearing considered and denied on the merits, extended the time for seeking review by this court. See, e.g., *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952). The 1980 revisions, however, specifically deal with the effect of timely petitions for rehearing and unmistakably imply that regardless of the action of the lower court, an untimely motion for rehearing has no effect on the statutory ninety day period. See 12 J. MOORE, H. BENDIX & B. RINGLE, *MOORE'S FEDERAL PRACTICE* § 607.04[12] (2d ed. 1982).

with respect to the district court's action, other than to say that the district court's ruling was proper and came only after full consideration of Petitioner's position. Petitioner's discussion of matters not properly before this Court is unfortunate and unworthy of a substantive response.

CONCLUSION

Petitioner's application for a writ of certiorari is untimely and must be dismissed. In addition, the Petition fails to set forth any basis for invoking this Court's extraordinary certiorari jurisdiction, nor does it demonstrate any error in the decisions below. Respondent, therefore, respectfully requests that the Petition be denied at Petitioner's cost.

Respectfully submitted,

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v.

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Respondent.

PROOF OF MAILING — AFFIDAVIT

I, William D. Sims, one of the attorneys for Jacobs Manufacturing Company, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the day of January, 1984, I deposited in a United States mailbox, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Brief for the Respondent in Opposition.

William D. Sims

Subscribed and sworn to before me, at Dallas, Texas,
this day of January, 1984.

Notary Public in and for
the State of Texas

My commission expires:

No. 83-1060

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JACOBS MANUFACTURING COMPANY,

Respondent.

AFFIDAVIT OF SERVICE

I, William D. Sims, one of the attorneys for Jacobs Manufacturing Company, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the day of January, 1984, I served copies of the foregoing Brief for the Respondent in Opposition on the petitioner's counsel of record, by depositing same in a United States mailbox, with first-class postage prepaid, addressed as follows:

Frank P. Hernandez, Esq.
Hernandez, Inc.
1714 Browder
Dallas, Texas 75215

William D. Sims

Subscribed and sworn to before me, at Dallas, Texas,
this day of January, 1984.

Notary Public in and for
the State of Texas

My commission expires:

APPENDIX

U. S. District Court
Northern District of Texas
FILED
Apr. 8, 1983
Nancy S. Hall, Clerk
Deputy

In The
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LYNN LAWThER, JR.,

Plaintiff

v.

JACOBS MANUFACTURING COMPANY,

Defendant

CIVIL ACTION NO. CA-3-82-1196-D

ORDER

In response to a Motion for Summary Judgment filed by Defendant The Jacobs Manufacturing Company (Jacobs), Plaintiff Lynn Lawther, Jr., (Lawther) produced certain documents but indicated that he could better respond following further discovery. This action is set for trial April 25, 1983, and Lawther has not attempted to supplement his brief, to bring additional evidence to the Court's attention, or to comply with Local Rule 5.2, which requires a response to a motion for summary judgment to identify the disputed and material facts and the issues of law.

Lawther is hereby notified that the Court will consider Jacobs' motion without the benefit of additional input from him if no further response is submitted to the Court within five days of the date of this Order.

It is so ORDERED.

Dated this 7th day of April, 1983.

/s/ ROBERT M. HILL
United States District Judge